No. 18,839

IN THE

United States Court of Appeals

For the Ninth Circuit

ZIEGLER CHEMICAL AND MINERAL CORPORATION, a corporation of New York,
Plaintiff and Appellant,

vs.

AMERICAN GILSONITE COMPANY,
a corporation of Delaware,
One of the Defendants and Appellee.

APPELLANT'S REPLY BRIEF

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Appellee's brief omits certain salient facts and disregards rules of law applicable to account stated.[1]

For instance, Appellee's Statement of the case does not mention that the alleged antecedent debt was an unliquidated contingent liability of Ziegler's *customers.* Ziegler was selling gilsonite, which is a mineral not covered by any patent. (Tr. 4, Par. 12.) Gilsonite could have been used by Ziegler's customers in

[1]Appellant and Appellee will sometimes hereafter be referred to, respectively, as "Ziegler" and "American". "Tr." refers to the Clerk's Transcript; "O.B." refers to Appellant's Opening Brief; "A.B." refers to Appellee's Brief.

other ways and for other purposes than those described in the patent of American.

Consequently, when Ziegler, in order to avoid harassment of his customers, offered to pay a royalty on behalf of his customers for each ton used by such customers in a certain way, Ziegler assumed an unliquidated obligation on behalf of third parties, namely its customers and in a disputed amount to be agreed upon by the parties. (Tr. p. 81.)

The letter of American to Ziegler of January 12, 1962 (three years subsequent to the offer of Ziegler), demands payment of back royalties, but this demand is made without waiving any right to additional sums which a complete audit may show to be due. This is an important fact indicating that the accurate amount allegedly due was even on January 12, 1962, still unliquidated.

American's statement (A.B. 6) that the Ziegler and Clement affidavits did not dispute any material fact set forth in the affidavits filed by American is effectively answered in the "Summary of Affidavits" pages 7 to 10 of Appellant's Opening Brief.

THE LETTERS OF ZIEGLER OF APRIL 10 AND DECEMBER 15, 1958 (Tr. 74, 79), CONSTITUTE MERELY AN OFFER OF SETTLEMENT OF AN UNLIQUIDATED CLAIM AGAINST ZIEGLER'S CUSTOMERS.

Almost the entire argument of appellee is based on the assumption that Ziegler's letters of April 10 and December 15, 1958, constitute an "account stated",

and no parol evidence would be admissible as to the circumstances surrounding the writing of these letters and as to the negotiations leading to the same.

The authorities cited on page 9 of American's Brief pertain to parol evidence in the case of the assignment of a building contract or in the case of written purchase agreements. Even under such circumstances in the case of *Ford v. Luria Steel and Trading Company*, 192 F. 2d 880, 882, cited by American, the Court of Appeals disagreed with the reasoning of the Lower Court that parol evidence tending to show "oral profit sharing agreement" was substantially inconsistent with subsequent actions of the parties, hence defendant there could not have prevailed. The Court of Appeals stated:

> "We question the validity of the second reason given by the District Court for its action. A surmise or belief, no matter how reasonably entertained, that a party cannot prevail upon a trial, will not justify refusing him his day in court with regard to material issues which are not clearly shown to be sham, frivolous, or so unsubstantial that it would obviously be futile to try them."

This is particularly important in the case of an alleged "account stated". A perusal of the affidavits and the exhibits in the case at bar shows that the consideration, if any, for the alleged account stated was the discharge of an unliquidated liability of third parties, hence parol evidence regarding the respective claims and counterclaims of the parties is relevant and admissible.

If, arguendo, the letters of Ziegler were considered as admissions, even then all the facts should be considered as to whether or not such admission is of the kind which could give rights on an "account stated".

6 Williston on Contracts (1938 Ed.) 5233, states the rule:

> "It should be remembered it is necessary to establish not an admission as such, but an implied promise; and all the facts of each case should be admissible in order to determine whether such an implication is warranted."

Consequently, Ziegler is entitled to introduce evidence to any and all contemporaneous understanding alleged in the affidavits.

> "An action on an account stated raises primarily a question whether both parties intended the transaction to become a full and final settlement of the indebtedness represented by the account. That question is usually one of fact to be determined by the jury or trial court from all the circumstances."
>
> 1 Cal. Jur. 2d, page 411.

CONSIDERATION FOR THE IMPLIED PROMISE IS AN ESSENTIAL PART OF ESTABLISHING AN "ACCOUNT STATED".

It is stated in 6 Williston on Contracts (1938 Ed.) on page 5236:

> ". . . and now an account stated is open to a wide variety of attack. Of course, it may be shown that the parties never agreed to an account stated. . . . But it may also be shown not only that the

> transaction was without consideration because the promise of the debtor was supported by no previous debt. . . . but that the consideration was illegal, or that there was failure of consideration or mistake."

The burden is on American to prove the alleged "account stated" and that it was supported by a previous debt of Ziegler to American. Such proof may be rebutted by Ziegler by showing that there was no previous debt owing by Ziegler to American, and further that Ziegler mistakenly believed that American could proceed against his customers for patent infringement on a valid patent, and also that the customers of Ziegler had liability to pay some royalty to American contingent upon the manner in which they used the gilsonite.

THE ARGUMENTS ON PAGES 11 TO 16 INCLUSIVE IN APPELLEE'S BRIEF ARE UNTENABLE IN FACT AND IN LAW.

The argument of American with regard to the Goodner and Owen affidavits on page 11 of Appellee's Brief demonstrates that there are material facts at issue, for instance as to the authority of Owen to bind American to a settlement of an unliquidated claim; as well as the actual subject of the conversation between Goodner and Owen throwing light upon the circumstances surrounding the threats of American against Ziegler's customers; and also the actual verbal understanding between the principal and negotiators, Goodner and Ziegler.

The argument on pages 12 and 13 of Appellee's Brief that when an account is stated by the debtor no "assent" by the creditor is required is refuted by American's cited authority. It is stated in 6 Corbin on Contracts (1962 Ed.) pp. 268-269:

> "Here, again, if the debtor's accounting is an offer to compromise and settle a claim then understood to be doubtful or disputed, the creditor's assent is necessary. Without it, there is only an unaccepted offer, one that is conditional on acceptance just as in the case of other offers."

In the case at bar, the alleged claim of American against the customers of Ziegler was doubtful and disputed. In fact it was disputed right up to the filing of this action and is still in dispute.

The above text continues on page 269 as follows:

> "Even though the statement of account is rendered by the debtor, with an enforceable promise to pay the amount, it is not customary to call it an account stated unless the creditor expresses his assent to it."

As it is stated in 1 Cal. Jur. 2d, page 380:

> "The rendering of an account, however, is only a circumstance which with others may or may not establish an account stated."

Consequently, the argument that the letter of December 15, 1958, constitutes an "account stated" or a promise to pay, is not consistent with the circumstances surrounding the transaction, nor with the law pertaining to it.

The argument of plaintiffs on pages 14 to 16 inclusive that American agreed to the "account stated" is contrary to the facts and the law of the case at bar.

American omits the introductory part of its letter of January 12, 1962, preceding the portion quoted on page 15 of its brief, namely that the demand was made without waiving any right to a complete audit of Ziegler's books for additional sums of money that may be due.

Consequently, even if, arguendo, American's letter of January 12, 1962, may be deemed "acceptance", it is a conditional acceptance subject to further audit.

American argues primarily that assent should be implied from its long silence.

The authorities cited on page 16 of American's brief pertain to liquidated claims or to long course of dealings between the parties. But 6 Corbin on Contracts (1962 Ed.), page 285, expressly distinguishes unliquidated and undisputed items from accounts based on merely addition and subtraction of numerical items, stating:

> "As previously indicated, however, it is necessary to consider separately the kind of an account that is merely the addition and subtraction of numerical items and a very different kind that introduces a compromise of disputed items or an agreed determination of previously unliquidated ones. If an 'account stated' is of the latter kind, the law applicable to it is the law of compromise and the law of accord and satisfaction. In these cases, it is misleading to deal with the matter under the general heading of 'account stated' ".

Also 6 Corbin on Contracts (1962 Ed.) page 267, states the rule:

> "If either the creditor or the debtor offers to liquidate a claim theretofore uncertain in amount or to compromise a doubtful or disputed claim by the payment of a specified amount, it is without question that an assent by the offeree is necessary. Such an offer is not even an admission as to an amount due. In cases of this sort, it is not often that silence should be interpreted as an expression of assent; in rare cases the surrounding circumstances may justify such an interpretation."

The case at bar evidently is not such a "rare case" because the circumstances surrounding the transaction are quite involved and the compromise is still in dispute.

American refers on page 16 of its brief to the creation of a "new obligation" on the account stated between the parties, but disregards the rule that the antecedent indebtedness, the discharge of which is the consideration for "new obligation" on an "account stated", must be between the parties to this account stated and not with a third party. Apart from any other argument, it is clearly evident from the affidavits that the unliquidated antecedent indebtedness in the case at bar was between American and third parties, namely the customers of Ziegler.

Swim v. Juhl, 72 Cal. App. 363;

Anderson v. Johnson, 101 Cal. 2d 418, 422.

CONCLUSION

It is respectfully urged that the judgment of the Court below on the counterclaims should be reversed.

Dated, San Francisco, California,
March 18, 1964.

Respectfully submitted,
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